Petitioner also creates an exaggerated portrayal of pre-hearing activity to support its argument that Herman Miller actively and unconditionally participated in the arbitration proceedings prior to moving for a stay of arbitration. Pet. 7-10. That portrayal was rejected by the Circuit Court. App. 3a-4a.

Herman Miller did not at any time argue or submit to the arbitrator the issue of whether there was an enforceable agreement to arbitrate between Herman Miller and Worth Capital. App. 12a-13a. All of the activity described by the petitioner in its brief was administrative in nature and directed, almost exclusively, to the tribunal administrator; and, at every stage prior to the filing of its motion for a stay of arbitration, the respondent's attorneys challenged the jurisdiction of the Association. App. 4a.

Not surprisingly, the petitioner ignores the conclusion drawn by the Circuit Court that in the two years prior to the filing of respondent's motion for a stay of arbitration, "little of substantive nature occurred in the interim." App. 3a. The record amply supports the Circuit Court's conclusion.

Subsequent to the petitioner's filing of its demand for arbitration with the Association on May 5, 1995, the following occurred:

- The issue of the proper venue for the demanded arbitration was resolved by the Association (not by an arbitrator) (Pet. 8);

- An arbitrator was selected (but no substantive issues — including the issue of arbitrability — were submitted for decision) (Pet. 8);

- Hearings were scheduled to commence on April 23, 1996, but were cancelled at the request of the petitioner's counsel and not re-scheduled until over two years later (Pet. 8);

- A preliminary conference was held on August 12, 1997, at which time the petitioner was required to serve an amended statement of claim and dates for arbitration were set for December, 1997 (Pet. 8);

- On or about September 3, 1997, the petitioner served an amended statement of claim (Pet. 10);

- On September 23, 1997, the respondent filed its motion to stay arbitration. Pet. 2.

There were no hearings held on the issue of arbitrability or the merits of the dispute prior to the respondent's action to stay arbitration — either before the Association or the arbitrator. The discovery disputes and the setting of arbitration dates for February of 1998, to which the petitioner refers (Pet. 10-11), all occurred after respondent filed its motion and were necessitated because petitioner's counsel would not consent to a stay of arbitration pending determination of respondent's motion.

Thus, contrary to the picture of feverish activity painted by the petitioner, the record reveals that substantive arbitration on any issue had not in fact commenced by the time that respondent filed its motion to stay arbitration. Indeed, by August 26, 1996, the Association, not having heard from petitioner's counsel regarding the status of the arbitration, was prepared to mark the matter as settled and withdrawn from arbitration.

The petition also ignores the Second Circuit's observation, grounded in the record, that the petitioner failed, between the commencement of the arbitration and the motion to stay arbitration, to respond to inquiries from both the respondent and the Association for production of the assignment upon which the petitioner claimed standing. In fact, the petitioner "did not produce the assignment on which it based its claim of arbitrability until after" the respondent commenced its suit to stay arbitration. App. 3a-4a.

It is on this record that the Circuit Court properly ruled that the respondent had not waived its right to contest before the District Court the existence of an enforceable, written agreement to arbitrate. Reduced to its essence, the petitioner's argument for the granting of its petition is that it is dissatisfied with the Circuit Court's application of the law to the facts of this case.

SUMMARY OF ARGUMENT

The question presented in this case has no implication beyond the facts of this case. There is no fundamental principle of federal law at stake in conflicting decisions to warrant issuance of a writ of certiorari. The Second Circuit applied well-settled principles of law to the facts in the record; the petitioner simply disagrees with the Circuit Court's decision.

REASONS FOR DENYING THE WRIT

The decision below was a correct application of settled law and petitioner does even allege a conflict among the circuit courts. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which [the Court uses its] certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.") The petitioner's argument in favor of granting its petition is simply that it disagrees with the Circuit Court's application of the law to the record before it and that the Circuit Court's decision is inequitable. Pet. 12. That is not a justifiable basis for granting a petition for a writ of certiorari. *See* Sup. Ct. R. 10 In any event, the Second Circuit was not in error.

" '[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). The Federal Arbitration Act does not alter that fundamental principle. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985). The Federal Arbitration Act "does not require parties to arbitrate when they have not agreed to do so (citation omitted)." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989).

A court, not an arbitrator, should make the threshold determination of whether there exists a written, enforceable agreement to arbitrate, unless there is clear and unmistakable evidence that the parties agreed to have the arbitrator decide

the issue. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). "But merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be effectively bound by the arbitrator's decision on that point." *Id.* at 946. Of course, in this case, the respondent never argued the issue of arbitrability to the arbitrator and never agreed to forego judicial review of that issue.

Rather than running "afoul of this Court's decision in *First Options*," as argued by the petitioner (Pet. 15), the Second Circuit's statement, consistent with *First Options*, took note that the respondent had "repeatedly reserved its right to contest the existence of an agreement to arbitrate." App. 4a. For example, in their May 30, 1995 letter to the Association, the respondent's attorneys made clear from the start that " 'Herman Miller retains its right to seek to dismiss the demand on [the] . . . ground[ ] . . . that claimant (*i.e.*, Worth Capital) is not a proper plaintiff because it is not a permitted assignee under the contract (and therefore can neither claim under the contract nor invoke its arbitration provisions).' " App. 4a. If the reservation of rights by respondent's counsel were not enough to demonstrate that the respondent did not intend to be bound to arbitration on any issue, the most palpable manifestation of its intent was the filing of its motion to stay arbitration — prior to the commencement of hearings before the arbitrator.

The petitioner predicts the virtual destruction of the arbitration process as a result of the Second Circuit's order. Pet. 15. The cases which petitioner cites in support of that dire prediction, however, are perfectly consistent with the Second Circuit's statement in support of its summary order. In each of those cases, the issue of whether there was an

enforceable, written agreement had actually been tried, argued or submitted to the arbitrator for decision, a decision of the arbitrator had already been rendered before the issue of arbitrability was asserted, or there was no issue as to the existence of an enforceable written arbitration agreement: *Conntech Development Co. v. University of Connecticut Education Properties, Inc.*, 102 F.3d 677 (2d Cir. 1996) (The issue before the court was whether certain claims fell within an agreement to arbitrate, not whether there existed an enforceable agreement; in any event the parties were substantially completed with trial on the merits before objections were raised); *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100 (2d Cir. 1991) (Objectants participated in hearings on the merits and did not raise the absence of an enforceable agreement to arbitrate until after the arbitral award was rendered); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698 (2d Cir. 1985) (Objectant made a motion to stay arbitration before the district court, but failed to raise the issue of the lack of an enforceable agreement to arbitrate), *cert. denied*, 475 U.S. 1067 (1986); *Fortune, Alsweet and Eldridge, Inc. v. Daniel*, 724 F.2d 1355 (9th Cir. 1983) (Respondent failed to make a motion to vacate the arbitration award within the statutory period following the rendering of the arbitrator's decision; respondent's representative attended several hearings on the merits during which the representative introduced evidence into the record); *Torrington Co. v. Metal Products Workers Union Local 1645*, 347 F.2d 93 (2d Cir.) (The issue was not whether there was an agreement to arbitrate but whether the dispute fell within the scope of the agreement), *cert. denied*, 382 U.S. 940 (1965); *Owen-Williams v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 907 F. Supp. 134 (D. Md. 1995) (Claimant submitted merits of dispute to arbitrators who rendered a decision adverse to claimant after

which claimant challenged the validity of the agreement to arbitrate), *aff'd*, 103 F.3d 119 (4th Cir. 1996); *New York Hotel and Motel Trades Council v. Hotel Nikko New York, Inc.*, Nos. 91 Civ. 0795, 91 Civ. 0755 (DNE), 1991 WL 168284 (S.D.N.Y. Aug. 22, 1991) (The objecting party filed its objections to the jurisdiction of the arbitrator only after the arbitration panel issued a decision on the merits); *Halley Optical Corp. v. Jagar International Marketing Corp.*, 752 F. Supp. 638 (S.D.N.Y. 1990) (Objecting party moved to vacate the arbitration award after a hearing on merits at which the issue of the existence of an arbitration agreement had actually been submitted to the arbitrators for decision); *International Longshoremen's Ass'n v. West Gulf Maritime Ass'n*, 594 F. Supp. 670 (S.D.N.Y. 1984) (The arbitration panel issued a decision before an objection was raised as to its jurisdiction); *Teamsters Local Union No. 533 v. Herbert Fuel Oil & Trucking Co.*, 543 F. Supp. 831 (E.D.N.Y. 1982) (The parties submitted the issue of whether there was an agreement to the arbitrator who rendered a decision); *Humble Oil & Refining Co. v. Local Union 866*, 271 F. Supp. 281 (S.D.N.Y. 1967) (The court refused to find waiver by mere participation of respondent in arbitration on merits; it did not appear that the Union and the Company agreed to leave the question of arbitrability to arbitrators).

The petitioner does not cite a single case (and the District Court was unable to find one [App. 13a]) which holds that a party waives his right to judicial review of the issue of whether there is an enforceable agreement to arbitrate because that party engaged in pre-arbitration activity limited to seeking a change of venue, selecting an arbitrator and setting dates for arbitration. What is manifest in the cases cited in the petitioner's brief is that actual submission of the dispute to an arbitrator, without protest

to the arbitrator's jurisdiction, is required before a waiver of judicial review may be found. *See Woodcrest Nursing Home v. Hotel, Hospital, Nursing Home and Allied Services Union, Local 144*, 788 F.2d 894, 899 (2d Cir. 1986); *Local 719, American Bakery and Confectionary Workers of America v. National Biscuit Co.*, 378 F.2d 918, 921-22 (3rd Cir. 1967). That is not what happened in this case. Respondent did not submit any issue to the arbitrator and it did not manifest an intent to forego judicial review of the issue of arbitrability. The Second Circuit properly applied existing law to the facts of this case.

In short, stripped of its hyperbole, Worth Capital's petition does nothing more than express dissatisfaction with the Second Circuit's view of the record. It is respectfully submitted that that is not enough to warrant a grant of a writ of certiorari to this Court.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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